THE SANCTION
OF
INTERNATIONAL LAW

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In a recent editorial of one of the legal periodicals, the author quotes Alexander Hamilton's statement in the Federalist, that "it is essential to the idea of law that it be attended with a *sanction*, or in other words, a penalty or punishment for disobedience," and from this premise draws the following conclusion: [1] "The law of nations, so-called, is a mere empty term or phrase, a high resounding name for something in and of itself vain and impotent."

To most authorities and students of international law, the author's conclusion is somewhat astounding, but the fact that the statement could be made by a prominent legal editor, illustrates the extent of the present popular distrust of the science.

From the substantive point of view, international law has reached an advanced stage of development. The methods of enforcing it are yet imperfect, but it is certainly not now wholly without "sanction." In his Digest of International Law, John Bassett Moore enumerates the following "modes of redress" for infringements of international rights:

(1) Negotiation; (2) good offices and mediation; (3) arbitration; (4) withdrawal of diplomatic relations; (5) retortion or retaliation; (6) display of force; (7) use of force; (8) reprisals; (9) pacific blockade; (10) embargo; (11) nonintercourse.

Intranational or municipal law relies ultimately for its enforcement on two instruments: (1) the power of public officers to whom the duty of enforcing the law has been delegated by common consent, and (2) the instrument of "self-help."

The present methods of enforcing international rights partake almost wholly of the nature of "self-help." In so far, however, as a nation employing them correctly interprets its rights, it is enforcing international law and gives to it "sanction."

Even with such remedies, inadequate though they are, the law is enforced in by far the large majority of cases. As in the administration of

[1] Bench and Bar, Vol. 9, No. 11, p. 478.

law within nations, the spectacular examples of miscarriage of justice, the armed revolts against the law are the exceptions. The records of the foreign office of any great nation, the many historical instances where recalcitrant nations have been forced to obey the law by the employment of some one of these "modes of redress," are evidence that the enforcement of the law is the rule.

"LEGAL" AND "ILLEGAL" WAR

War is recognized in international law at present as, under some circumstances at least, a legal method of enforcing rights. It is not countenanced as legal when prosecuted for plunder or oppression, or except as an ultimate remedy; nor is there in international law any recognition of the theory that it is beneficial as a sort of national virulent exercise, or that it is the necessary permanent fruit of irreconcilable racial differences. The theory of "legal war" was probably correctly stated in the Instructions for the Government of the Armies of the United States in the Field, issued in 1863, as follows: [2]

> Modern times are distinguished from earlier ages by the existence at one and the same time of many nations and great governments related to one another in close intercourse.
>
> Peace is their normal condition; war is the exception. The ultimate object of all modern war is a renewed state of peace. * * *
>
> Ever since the formation and coexistence of modern nations, and ever since wars have become great national wars, war has come to be acknowledged not to be its own end, but the means to obtain great ends of state, or to consist in defense against wrong.

Some writers in international law, including Vattel [3] and Bynkershoek,[4] have defined war generally as the method by which nations prosecute their "rights." Grotius was more discriminating and said: [5] "We do not say that war is a state of *just* contention, because precisely the point to be examined is, whether there be just war, and what war is just." Obviously, war prosecuted by a nation which incorrectly interprets the law and its rights thereunder, operates not to enforce but to defeat the law.

[2] General Orders No. 100, War of the Rebellion, Official Records, Series III, 151.
[3] Book 3, Ch. 1, Par. 1.
[4] Book 1, Ch. 1.
[5] *Ibid.*, Par. 2.

It is difficult to reconcile with the principle that aggressive war is sometimes "legal" under international law the prevalent theory of the unlimited right of self-defense by nations. Most authorities state unqualifiedly that a nation attacked with force has not only the right but the duty to repel the attack, wholly regardless of its cause. Halleck says:[6]

> Self-preservation * * * is one of the most essential and important rights incident to State sovereignty. * * * It is not only a right with respect to other states, but a duty with respect to its own members and one of the most solemn and important duties which it owes to them.

Even Sir Edward Fry, a Quaker, and former Law Justice of Great Britain, said at The Hague in 1907:

> * * * My government recognizes that it belongs to the duty of every country to protect itself against its enemies and against the dangers by which it may be threatened, and that every government has the right and the duty to decide what its own country ought to do for this purpose.

If the right of a nation to defend itself is unlimited, and if there is also the right to prosecute aggressive war in the enforcement of rights, the curious anomaly, repulsive to standards of legal consistency, results that two warring nations may both be acting quite within their international legal rights and the enforcement of either right is inconsistent with the other.

In the evolution of law among individuals there was once a time when "self-help" was used extensively as a means by which rights were enforced. Pollock and Maitland, speaking of mediæval English law, say:[7]

> For a long time, law was very weak, and as a matter of fact, it could not prevent "self-help" of the most violent kind. Nevertheless, at a fairly early stage in its history it begins to prohibit in uncompromising terms any and every attempt to substitute force for judgment. * * * So fierce is it against "self-help" that it can hardly be induced to find a place even for self-defense.

[6] Halleck, International Law, Vol. I, p. 120.

[7] Pollock and Maitland, History of the English Law, Vol. II, p. 574.

As the law has developed, the duty of enforcing it and the right to employ force for this purpose have been under most circumstances taken from individuals and delegated to public officials who act after rights have been judicially determined. "Self-help" has, however, been retained as a supplementary means of enforcing the law in certain instances, notably in the right to abate nuisances and to restrict certain trespasses, and to defend against assaults. The New York Penal Law provides [8] that the use of "force or violence upon or towards the person of another is not unlawful" in six enumerated classes of cases. Self-defense is specifically authorized, but at the same time, the right is strictly limited in the following language: [9]

> An act, otherwise criminal, is justifiable when it is done to protect the person committing it, or another whom he is bound to protect, from inevitable and irreparable personal injury, and the injury could only be prevented by the act, nothing more being done than is necessary to prevent the injury.

An individual does not have the legal right to employ "self-help," except as so authorized, and has no right to defend himself against the acts of either individuals or police officers legally engaged in enforcing the law.

Drawing conclusions from analogies is always dangerous, but if the evolution of international law is to follow at all the evolution of intranational law, it seems probable that the future will realize neither the theory that the right of individual nations to use force will be entirely abolished, nor the theory that the right to employ it will continue without limit; but that the responsibility of enforcing international law will at some time be delegated to specially authorized officials, and national "self-help" will be permitted, so far and only so far as it assists in establishing justice and order.

INTERNATIONAL "CIVIL" AND INTERNATIONAL "CRIMINAL" LAW

Intranational law is divided into two classes, civil law and criminal law. Civil law deals with acts and rights affecting primarily individuals only and not the community as a whole. Criminal law deals with acts

[8] Section 246.
[9] Section 42.

which, though usually infringing the rights of specific individuals, are also conceived as affecting the public welfare and the order of the entire state.

International law has not drawn a similar distinction in dealing with the acts of nations. A recognition that there are certain controversies which are essentially of a civil nature has been evident in many recent conferences and conventions. The Russian project at The Hague in 1907 for "compulsory arbitration" enumerated a long list of such controversies, including "conflicts regarding pecuniary damages suffered by a state or its citizens in consequence of illegal or negligent action on the part of any state or the citizens of the latter," disagreements regarding interpretations of treaties concerning postal and telegraphic service and railways, patents, trade-marks, weights and measures, inheritances, and similar subjects.

It seems also obvious that certain international treaties partake wholly of the nature of private contracts, and that others signed by many nations may partake of the nature of international legislation, and are of such a character that their breach may involve moral turpitude and may so affect the entire community as to partake of the nature of a crime against the community. Mr. Roosevelt applies this theory with characteristic emphasis in his interpretation of Germany's admitted violation of the treaty guaranteeing Belgium's neutrality,[10] in the following language:

> When Germany thus broke her promise, we broke our promise by failing at once to call her to account. The treaty was a joint and several guarantee and it was the duty of every signer to take action when it was violated. * * * All (Germany's acts) separately and collectively were criminal actions against international right, against civilization, against justice and humanity throughout the world. * * * Even if not called upon to act by the Hague Convention, she (the United States) has the right and the duty as soon as any such gross violations of international law occur. This is the only way to establish proper precedents in international law and to save it from becoming a farce.

In so far as this purports to state the *legal obligation* of the United States, it is not in accordance with hitherto accepted principles of international law. Andrew Jackson took a similar position regarding certain

[10] Metropolitan Magazine, Oct., 1915.

acts of France in 1835 and was answered by Mr. Gallatin in a letter to Mr. Everett as follows: [11]

The general position assumed by the President, and apparently sustained by Judge Wayne and others, is, that whenever a nation has a claim clearly founded in justice, as that in question undoubtedly is, and justice is denied, resort must ultimately be had to war for redress of the injury sustained. This, as an abstract proposition, is wholly untenable, supported neither by the practice of nations nor by common sense. The denial of justice gives to the offending nation the right of resorting to arms, and such a war is just so far as relates to the offending party. But to assert that a nation *must* in such a case, without attending either to the magnitude or nature of the injury, and without regard either to its own immediate interest or to political considerations of a higher order affecting perhaps its foreign and domestic concerns, inflict upon itself the calamities of war, under the penalty of incurring disgrace, is a doctrine which, if generally adopted, would keep the world in perpetual warfare, and sink the civilized nations of Christendom to a level with the savage tribes of our forests.

Whether Mr. Roosevelt's interpretation of the morality of Germany's conduct or of our duty is correct or not, it is certainly conceivable that a nation might so act as to violate the rights and jeopardize the safety of the whole community of nations, and that its act might call for concerted action by the community. Nevertheless, for perhaps wise reasons, international law has refrained from characterizing such conduct, however reprehensible, as an "international crime." The law is stated by Oppenheim in his work on international law,[12] as follows:

International delinquency is every injury to another state committed by the head of the government of a state through neglect of an international duty. * * *

An international delinquency is not a crime, because the delinquent state as a sovereign cannot be punished, although compulsion may be exercised to procure a reparation of the wrong done. * * *

The nature of the law of nations, as a law *between, not above sovereign states,* excludes the possibility of punishing a state for an international delinquency and of considering the latter in the light of a *crime.*

Whether a nation which so acts as to disturb the rights and good order of the entire world be termed legally a "delinquent," or a "criminal," is

[11] 2 Gallatin's Writings, 494.

[12] Vol. I, 2nd Ed., p. 209, *et seq.*

perhaps a matter of terminology. Whatever the term, the conception is growing that a nation's acts which, as a matter of fact, have this effect, should in some way be subject to the world's control.

The theory is not new. Daniel Webster in 1842, as Secretary of State, wrote to the American Minister at Mexico as follows:

> Every nation, on being received, at her own request, into the circle of civilized governments, must understand that she not only attains rights of sovereignty and the dignity of national character, but that she binds herself also to the strict and faithful observance of all those principles, laws, and usages which have obtained currency among civilized states. * * *
>
> No community can be allowed to enjoy the benefit of national character in modern times without submitting to all the duties which that character imposes.

Mr. Evarts, as Secretary of State, in 1877, said:

> If a government "confesses itself unable or unwilling to conform to those international obligations which must exist between established governments of friendly states, it would thereby confess that it is not entitled to be regarded or recognized as a sovereign and independent Power."—Ms. Instr. Mexico, XIX 357.

An interesting attempt to harmonize the theory of inviolable national sovereignty and the conception of the existence of certain rights of the "international community" is found in Internoscia's Code of International Law, published in 1910. He defines the "international community" as follows: [13]

> The International Community is the voluntary union of the States that aim at the attainment by their common endeavors of the full development of their powers and of the satisfaction of their needs, in order to assure the good of all men.

In his introduction he explains his theory of world organization as follows: [14]

> The community of states to be organized for the juridical protection of international law must be a supreme power destined to respect and to command the respect of the independence of the people. * * *

[13] Part 1, Book 1, Tit. 1, par. 13.

[14] P. xv, xxvii.

When a state, contrary to the rules of international law, conquers or abuses another state, the former state although sovereign becomes liable to be brought before the authority that represents the strength of the rest of the world, and if it refuses to recognize such authority, while left free to combat the whole world, it must incur the penalty of its folly even to the point of destruction, if need be, in order that the disturbance it has caused may be removed. The peace and tranquillity, the good and the welfare of the whole of humanity must be secured even at the cost of annihilating a rebellious part of it. * * *

This code * * * is not opposed to the well-established belief of the freedom of a state. This code recognizes the freedom of a state to act as it pleases so far that it grants the rights of a belligerent to a state when it contests the execution of the judgment rendered against it.

In the development of the law of crimes in intranational law, the process was gradual by which certain acts originally viewed solely as torts affecting only single individuals were brought within the conception of being crimes against the entire state. The whole law of crimes has been evolved from the ancient law of torts. In this development the individual has been required to surrender many of what were previously considered his rights, in the interest of the rights of others and the good order of the community.

In international law, so strong is the theory that the dignity of national sovereignty should be upheld, and that the law of nations is a law "between not above sovereign states," that it is doubtful that the now termed "delinquencies" of nations will soon, if ever, be stigmatized with the term "international crimes." In our own national organization, though we have formed a strong federal government, the theory that the States are sovereign political units has always excluded the conception that a State is legally capable of committing a crime. Nevertheless, it seems probable from present indications and the natural necessities of the situation, that international law will ultimately provide for some method of central control over acts of nations of a quasi-criminal nature, and that individual nations will find it to their mutual interest to surrender some of what are at present deemed their sovereign rights, in the interest of the welfare and order of the community of nations.

International law does therefore at the present time have "sanction." That sanction rests almost wholly on the ultimate force of "self-help."

The tendency will be to delegate the duties both of enforcing civil rights and of controlling quasi-criminal acts to authorized officials and to preserve "self-help" so far and only so far as it proves an orderly auxiliary.

In the law's evolution, the conception of the collective rights of the community of nations will enlarge. National acts and rights will fall naturally into two classes, one comprising those of a civil and the other those of a quasi-criminal nature.

Finally, international law must and will ultimately be looked upon as a law and a force not merely between, but also above even sovereign nations.

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